INDEX

487-564—72——1

CITATIONS

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1178

GULF STATES UTILITIES COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION,
CITY OF LAFAYETTE, LOUISIANA, AND
CITY OF PLAQUEMINE, LOUISIANA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–29a)[1] is reported at 454 F. 2d 941.

JURISDICTION

The judgment of the court of appeals was entered on October 12, 1971 (Pet. App. 30a), and a timely

---

[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari filed in this Court by Gulf States Utilities Company. "App." refers to the separate appendix filed in this Court after certiorari was granted.

petition for rehearing was denied on December 15, 1971 (Pet. App. 31a). The petition for a writ of certiorari was filed on March 11, 1972, and was granted on May 30, 1972 (406 U.S. 956). The jurisdiction of this Court rests on 28 U.S.C. 1254(1) and on Section 313(b) of the Federal Power Act, 16 U.S.C. 825*l*(b).

QUESTION PRESENTED

Whether, in determining if an electric utility's application for authorization to issue securities is "for some lawful object, * * * and compatible with the public interest," as required by Section 204(a) of the Federal Power Act, the Federal Power Commission must consider claims that the funds to be raised will be used for anticompetitive purposes.

STATUTES INVOLVED

Section 204 of the Federal Power Act, 49 Stat. 850, 16 U.S.C. 824c, provides in part:

> (a) No public utility shall issue any security, or assume any obligation or liability as guarantor, indorser, surety, or otherwise, in respect of any security of another person, unless and until, and then only to the extent that, upon application by the public utility, the Commission by order authorizes such issue or assumption of liability. The Commission shall make such order only if it finds that such issue or assumption (a) is for some lawful object, within the corporate purposes of the applicant, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper

performance by the applicant of service as a public utility and which will not impair its ability to perform that service, and (b) is reasonably necessary or appropriate for such purposes. The provisions of this section shall be effective six months after August 26, 1935.

(b) The Commission, after opportunity for hearing, may grant any application under this section in whole or in part, and with such modifications and upon such terms and conditions as it may find necessary or appropriate, and may from time to time, after opportunity for hearing and for good cause shown, make such supplemental orders in the premises as it may find necessary or appropriate, and may by any such supplemental order modify the provisions of any previous order as to the particular purposes, uses, and extent to which, or the conditions under which, any security so theretofore authorized or the proceeds thereof may be applied, subject always to the requirements of subsection (a) of this section.

(c) No public utility shall, without the consent of the Commission, apply any security or any proceeds thereof to any purpose not specified in the Commission's order, or supplemental order, or to any purpose in excess of the amount allowed for such purpose in such order, or otherwise in contravention of such order.

* * * * *

Other pertinent provisions of the Federal Power Act, 16 U.S.C. 791a, *et seq.*, the Clayton Act, 15 U.S.C. 12, *et seq.*, the Interstate Commerce Act, 49 U.S.C. 1, *et seq.*, and the Public Utility Holding Company Act,

487-564—72——2

15 U.S.C. 79, *et seq.*, are set forth at Pet. App. 43a–59a and at FPC Br. App. 29–62.[2]

INTEREST OF THE UNITED STATES

This case raises an important question concerning the duty of the Federal Power Commission to consider anticompetitive factors in administering the Federal Power Act, 16 U.S.C. 791a, *et seq.* The United States is interested in the proper definition of the complementary roles of the regulatory agencies and the federal courts in furthering the fundamental national economic policy expressed in the federal antitrust laws. Consideration of antitrust factors by regulatory agencies in determining whether proposed conduct is in the "public interest" not only can serve to promote this fundamental policy, but also can have an important impact on the enforcement jurisdiction of the courts. By preventing in their incipiency transactions which might otherwise develop into full-blown violations of the antitrust laws or by conditioning approval of proposed actions on the remedying of past violations, an agency can make unnecessary prolonged and burdensome suits to enforce the antitrust laws.

STATEMENT

In October 1970 the Gulf States Utilities Company ("Gulf States"), an electric utility engaged in the generation, distribution, and sale at retail and for resale of electric energy in southeastern Texas and south central Louisiana (App. 5), applied to the Federal

[2] "FPC Br." refers to the Brief for the Federal Power Commission In Support of Petitioner, filed in this Court.

Power Commission for authorization pursuant to Section 204(a) of the Federal Power Act, 16 U.S.C. 824c(a), to issue $30,000,000 worth of long-term bonds (App. 1–52). The purpose of the bond issue was to refund part of the company's outstanding commercial paper and short-term notes (App. 5).[3]

After the Commission gave notice of the application, 35 Fed. Reg. 16649, the cities of Lafayette and Plaquemine, Louisiana, filed a protest and petition to intervene (App. 54–160), contending that the funds to be raised would not be used for a "lawful object" compatible with the "public interest," as required by Section 204(a) of the Act, but instead would be applied to finance or refinance attempts to suppress competition (App. 56–57). The cities alleged that Gulf States, the Louisiana Power and Light Company and the Central Louisiana Electric Company had for several years engaged in activities "apparently violative of the antitrust laws," as well as other federal statutes (App. 56).

The cities claimed that the three utilities had attempted to destroy the Louisiana Electric Cooperative ("LEC")—a generation and transmission electric cooperative financed by the Rural Electrification Administration (Pet. App. 5a)—and pointed to a history of "extraordinary litigation" by the utilities between 1964 and 1970 to prevent LEC from constructing generating and transmission facilities with loans which

[3] The company had used the proceeds from the notes to help finance its construction program and for other corporate purposes (App. 162).

had been approved by the Administration (App. 60, 71–74). The facilities would permit LEC to provide wholesale power to eight of its twelve member distribution cooperatives which at the time bought their power from the three utilities (Pet. App. 5a). The cities further charged that Gulf States and the other companies had agreed not to transmit LEC power on any of their lines unless a 1968 agreement among the cities, LEC and the Dow Chemical Company to establish an interconnection and pooling system was cancelled (App. 57–59). The cities claimed that the pooling arrangement would provide them with important economic benefits not available under their existing interconnection agreements with the three utilities (App. 58).

Accordingly, the cities requested that Gulf States' proposed financing not be approved unless conditioned upon cessation of the alleged anticompetitive activities and rectification of their effects. If Gulf States would not consent to such a condition, the cities asked the Commission to permit them to intervene as full parties and to hold a hearing to investigate the challenged activities and to determine whether and under what conditions Gulf States' financing should be approved (App. 56–57, 65–66).

In its answer (App. 165–176) to the cities' petition, Gulf States asserted that the purpose of Section 204 "is to prevent unsound financing which might impair the financial integrity of public utilities," and that, accordingly, the cities' allegations of unlawful activity—which it denied—were "irrelevant to this application" (App. 167, 173).

The Commission agreed with Gulf States. Denying the request for a hearing, the Commission issued a brief order authorizing the issuance of the bonds on the grounds that they were for a lawful object and compatible with the public interest (App. 181–185). As to the cities' protest, the Commission held (App. 184):

> (6) The matters asserted and activities alleged in the filed protest and petition to intervene by the Cities of Lafayette and Plaquemine, Louisiana, are irrelevant to the purpose of issuing bonds to refund short-term indebtedness heretofore authorized by the Commission.

The cities' petition for rehearing was denied (App. 201).

On petition for review, the court of appeals unanimously reversed the Commission (Pet. App. 1a–29a). The court referred to "the nation's profound and pervasive devotion to competition as a fundamental economic policy" (Pet. App. 13a), and cited numerous decisions to the effect that where an agency is called upon to determine whether a proposal is in the "public interest," the agency "has the authority and typically the responsibility to consider a challenge based on the asserted anti-competitive purpose or consequence of the proposal" (Pet. App. 12a). Noting that Section 204(a) of the Federal Power Act is virtually identical to the relevant portion of Section 20a of the Interstate Commerce Act, 49 U.S.C. 20a, the court found controlling this Court's decision in *Denver & Rio Grande Western R. Co.* v. *United States,* 387 U.S. 485

(Pet. App. 14a–16a).[4] The Court there held that the Interstate Commerce Commission, in deciding under Section 20a whether a particular issuance of securities is compatible with the public interest, must consider not only the financial integrity of the issuing company, but also the anticompetitive effects of the transaction. However, while holding that the Federal Power Commission similarly must consider the anticompetitive effects of proposed issuances of securities, the court below made clear that it was not imposing a requirement that evidentiary hearings on the antitrust issues be held in every case. Such issues could be disposed of without hearing if accompanied by an explanation, supported by the record, showing that no substantial anticompetitive issues were raised or that there was no "reasonable nexus between the activities challenged and the activities furthered by the application" (Pet. App. 22a).[5]

In the same opinion, the court of appeals also considered petitions filed by the cities to review two orders

[4] The court below declined to follow the Commission's decision in *Pacific Power & Light Co.*, 27 FPC 623, that in authorizing the issuance of securities under Section 204 it need consider only the impact of the securities on the issuer's financial integrity and ability to operate. The court held that *Denver & Rio Grande*, decided five years later, had undercut the rationale of that decision (Pet. App. 16a–19a).

[5] The court of appeals also indicated that the Commission might approve "a large portion of the application," reserving decision on the competitive issues, or might even approve an entire application, reserving until a later, separate application, in a different time frame, consideration of the competitive issues (Pet. App. 23a).

of the Securities and Exchange Commission under Section 7 of the Public Utility Holding Company Act, 15 U.S.C. 79g, authorizing the issuance of various securities by the Louisiana Power and Light Company. In authorizing issuance of the securities, the SEC had refused to hold a hearing on the cities' allegations of anticompetitive conduct—which were similar to the allegations made in the proceeding before the Federal Power Commission—on the ground that the alleged conduct was not relevant to the limited inquiry under Section 7 (Pet. App. 7a–8a). The court of appeals affirmed the SEC orders, holding that while the SEC has some jurisdiction over the structure of the power industry, it, unlike the Federal Power Commission, "has not been given any regulatory jurisdiction over operations of the company" (Pet. App. 27a), and thus need not as a general rule consider the impact of an applicant's operations on a competitor or potential competitor under Section 7 of the Holding Company Act (Pet. App. 29a).[6]

---

[6] In their memorandum in opposition to the petition in this case, the cities contended that there is no basis for distinguishing between the Securities and Exchange Commission's responsibilities under Section 7 of the Holding Company Act and the Federal Power Commission's responsibilities under Section 204 of the Federal Power Act and stated that they "reserve the right" to attack the affirmance of the orders of the SEC if certiorari were granted (Mem. in Opp., p. 3). But, since the cities did not petition from that aspect of the court of appeals' decision and since their time for petitioning had expired prior to the filing of their memorandum in opposition, the propriety of the SEC orders is not in issue before this Court.

SUMMARY OF ARGUMENT

1. Under Section 204(a) of the Federal Power Act, 16 U.S.C. 824c(a), a public utility may not issue securities until the Federal Power Commission has determined that the issue is "for some lawful object * * * and compatible with the public interest." Section 204(a) is directly patterned after, and is virtually identical to, Section 20a(2) of the Interstate Commerce Act, 49 U.S.C. 20a(2). In *Denver & Rio Grande Western R. Co.* v. *United States,* 387 U.S. 485, this Court held that the Interstate Commerce Commission is required to consider competitive factors before approving a stock issue under Section 20a(2). The decision in *Denver & Rio Grande* is controlling here, not only because similar statutory provisions are involved, but because the Federal Power Commission, like the Interstate Commerce Commission, has broad regulatory authority over the structure and operations of the industry it regulates.

The decision in *Denver & Rio Grande* is but a specific application of the general rule that agencies with broad economic regulatory powers must consider antitrust policies to give "understandable content to the broad statutory concept of the 'public interest.' " *Federal Maritime Commission* v. *Aktiebolaget Svenska Amerika Linien,* 390 U.S. 238, 244. In enacting regulatory statutes such as the Interstate Commerce Act and the Federal Power Act, Congress has entrusted federal agencies with economic regulatory authority over certain industries in partial substitution for free competition. But, with some exceptions not relevant

here, the antitrust laws continue to be applicable to such industries, and the agencies must administer their respective statutes in the light of the basic policies behind those antitrust laws. By giving the agencies the responsibility of scrutinizing transactions for anticompetitive consequences before the transactions are effected, Congress has made the agencies a first line of defense against anticompetitive practices which, if unchecked, might become full-blown violations of the antitrust laws. The agencies thus complement the courts in advancing antitrust policies.

2. The structure and legislative history of the Federal Power Act confirm that the Commission must consider anticompetitive factors in determining under Section 204 whether an issuance of securities is in the public interest. In adopting the broad public interest standard in Section 204 to govern securities issues, Congress specifically rejected a provision which would have limited the Commission's function to determining whether a securities issue was for one of several enumerated purposes. The clear implication is that in making this choice Congress intended that the Commission would take into account a broad range of considerations in authorizing securities issues. The fact that Congress expressed a particular desire to promote sound financial practices and eliminate fiscal manipulations is no indication that Congress wished the Commission to refrain from considering other fundamental public policies such as those expressed in the antitrust laws.

487-564—72——3

Section 204 was enacted as part of Title II of the Public Utility Act of 1935. Title I of that Act encompassed the Public Utility Holding Company Act, which was designed to curb certain abusive practices of public utility holding companies and diminish the high economic concentration among utilities by simplifying public utility holding companies and placing their future growth under federal supervision. Title II of the Public Utility Act encompassed Part II of the Federal Power Act and gave the Federal Power Commission substantial regulatory authority over the rapidly growing business of transmitting and selling at wholesale interstate electric power. In giving the Commission these powers, Congress was well aware of the special role of periodic competition in the electric power industry. The Commission concedes that it must weigh anticompetitive factors in determining what is in the public interest with respect to proceedings under many Sections of the Federal Power Act, but denies that it has any such obligation with respect to proceedings under Section 204. In view of the structure and legislative history of the Federal Power Act, there is no basis for concluding that the term "public interest" is used in a narrower sense in Section 204 than in other Sections of the Act.

3. The decision below gives the Commission sufficient flexibility so that it can consider anticompetitive consequences in connection with a proposed securities issue without unduly interfering with the timing of the sale of the securities. The Commission need not

dwell on the allegations of anticompetitive conduct, for example, if it finds that there is no substantial factual basis for such claims or that there is no rational nexus between the allegations and the proposed securities issue for which approval is sought under Section 204.

ARGUMENT

I. THE DECISION OF THIS COURT IN DENVER & RIO GRANDE [redacted]. IS CONTROLLING HERE AND REQUIRES THE FEDERAL POWER COMMISSION TO CONSIDER COMPETITIVE FACTORS IN DECIDING WHETHER PROPOSED SECURITIES ISSUES ARE COMPATIBLE WITH THE PUBLIC INTEREST

In *Denver & Rio Grande Western R. Co.* v. *United States,* 387 U.S. 485, this Court held that the Interstate Commerce Commission, in performing its duty under Section 20a(2) of the Interstate Commerce Act (49 U.S.C. 20a(2)) to determine whether the issuance of particular securities is "for some lawful object * * * and compatible with the public interest," must as a general rule consider the anticompetitive consequences of the issuance. 387 U.S. at 498. When Congress vested in the Federal Power Commission substantially the same responsibility with respect to the securities issues of electric power utilities, it similarly required the Commission under Section 204(a) of the Federal Power Act (16 U.S.C. 824c(a)) to authorize only issuances that are "for some lawful object * * * and compatible with the public interest." The virtually identical wording of these Sections of the two

Acts [7] was intentional; Congress patterned Section 204 (a) after Section 20a. S. Rep. No. 621, 74th Cong., 1st Sess., p. 20. It follows that *Denver & Rio Grande* is controlling here under the traditional principle of statutory construction that like provisions—and especially those intentionally alike—normally receive like interpretations. *E.g., Pott* v. *Arthur,* 104 U.S. 735; Sutherland, *Statutory Construction,* § 5201 (3rd ed.).

We need not rely on the similarity of the statutory provisions alone, however, for *Denver & Rio Grande* represents but a specific application of the broad doctrine of complementary regulation under which agencies with economic regulatory authority over particular industries are required to consider basic antitrust policies in carrying out their regulatory

---

[7] Section 20a(2) of the Interstate Commerce Act reads in pertinent part:

"* * * The Commission shall make such order [of authorization] only if it finds that such issue or assumption: (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose * * *."

Section 204(a) of the Federal Power Act reads in pertinent part:

"* * * The Commission shall make such order [of authorization] only if it finds that such issue or assumption (a) is for some lawful object, within the corporate purposes of the applicant and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the applicant of service as a public utility and which will not impair its ability to perform that service, and (b) is reasonably necessary or appropriate for such purposes. * * *"

functions. While its authority is in certain respects not as broad as that of the Interstate Commerce Commission, the Federal Power Commission is vested with considerable economic regulatory power over the electric power industry. No meaningful distinction can be drawn between the case at bar and *Denver & Rio Grande.*

1. *Denver & Rio Grande* arose out of an application by the Railway Express Agency for approval under Section 20a of the Interstate Commerce Act of the issuance of 500,000 shares of common stock (which when issued would constitute 20 percent of its outstanding common stock) to the Geryhound Corporation, a competitor in the express business. An agreement between Railway Express and Greyhound contemplated that within 60 days of the issuance of the 500,000 shares, Greyhound would acquire an additional one million shares of common stock—enough to give it control of Railway Express. Only the proposed issuance of the 500,000 shares, however, was submitted for ICC approval. 387 U.S. at 489–490. Numerous rail and motor carriers complained that the proposed transaction was severely anticompetitive and therefore not in the public interest, and that, since it was a first step in the acquisition of "control" of Railway Express by Greyhound, a hearing was required under Section 5(2) of the Act, 49 U.S.C. 5(2).[8] 387 U.S. at 489–490.

[8] Under Section 5(2), a carrier acquiring control of another carrier must obtain the approval of the Interstate Commerce Commission, which can act only after affording "reasonable opportunity for interested parties to be heard." Section 5(2)(b).

The Commission refused to consider the anticompetitive issues and approved Railway Express' application without a hearing. 387 U.S. at 491. On appeal from an order of a three-judge court upholding the Commission's approval, this Court reversed.

While agreeing that the Commission did not abuse its discretion in deferring a hearing under Section 5 until it became clear whether or not Greyhound would acquire the additional 1,000,000 shares of common stock and thus obtain "control" of Railway Express (387 U.S. at 499–500), the Court held that the Commission should have considered the anticompetitive issues raised prior to authorizing the issuance of 500,000 shares under Section 20a. The Court rejected the Commission's argument that Section 20a was intended solely to protect stockholders and the public from fiscal manipulation, stating (387 U.S. at 492):

> * * * Even if Congress' primary concern was to prevent such manipulation, the broad terms "public interest" and "lawful object" negate the existence of a mandate to the ICC to close its eyes to facts indicating that the transaction may exceed limitations imposed by other relevant laws. Common sense and sound administrative policy point to the conclusion that such broad statutory standards require at least some degree of consideration of control and anticompetitive consequences when suggested by the circumstances surrounding a particular transaction. * * *

The Court noted that the Commission is required to weigh anticompetitive effects in determining under

Section 5 of the Act whether a proposed merger or acquisition of control is "consistent with the public interest" (see *McLean Trucking Co.* v. *United States*, 321 U.S. 67), and concluded that the "foundations of the ICC's obligations under § 5 are largely applicable to § 20a as well." 387 U.S. 492–493.

In holding that the Interstate Commerce Commission is required, as a general rule, to consider anticompetitive consequences prior to approving stock issues under Section 20a, the Court stated that in some cases the Commission might legitimately decline to hold a hearing or defer consideration of the anticompetitive issues. In such circumstances, however, the reviewing courts must "closely scrutinize" the Commission's action. 387 U.S. at 498. With respect to Railway Express' proposed issuance of 500,000 shares of common stock, the Court found the anticompetitive issues sufficiently serious to require pre-issuance consideration by the Commission. 387 U.S. at 501–507.

2. Gulf States attempts (Br. 6–9) to distinguish *Denver & Rio Grande* on the ground that the Court, in discussing the Interstate Commerce Commission's overall responsibilities, focused on the Commission's specific obligation under Section 11 of the Clayton Act (15 U.S.C. 21) to enforce Section 7 of that Act (15 U.S.C. 18) against common carriers subject to its jurisdiction [9] and on the Commission's general duty to advance the competitive policies reflected in the Na-

[9] The complainants had alleged that Railway Express' issuance of securities would violate Section 7 of the Clayton Act. 387 U.S. at 490–491.

tional Transportation Policy (49 U.S.C. preceding Section 1). 387 U.S. at 493. Gulf States points out (Br. 9) that the Federal Power Commission is not obligated to enforce the Clayton Act or advance the National Transportation Policy.

The Court's decision in *Denver & Rio Grande,* however, did not turn on the Interstate Commission's duties with respect to the Clayton Act, nor was it confined to consideration of the National Transportation Policy. In referring to those duties, the Court was merely illustrating the scope of the Commission's regulatory obligations to underscore the illogic of the Commission's narrow reading of the terms "lawful object" and "public interest" contained in Section 20a. Indeed, immediately after noting that the Interstate Commerce Commission is required to weigh anticompetitive consequences in determining whether merger or acquisition of control applications are "consistent with the public interest" under Section 5 of the Interstate Commerce Act, the Court added that (387 U.S. at 492–493):

> * * * similarly broad responsibilities are encompassed within like broad directives addressed to other agencies. *E.g., National Broadcasting Co.* v. *United States,* 319 U.S. 190, 224; *FCC* v. *RCA Communications, Inc.,* 346 U.S. 86, 94; *California* v. *FPC,* 369 U.S. 482, 484–485.

Of particular relevance here is the Court's citation to *California* v. *Federal Power Commission.* In the

cited passage, the Court in that case stated (369 U.S. at 484-485):

> Evidence of antitrust violations is plainly relevant in merger applications, for part of the content of "public convenience and necessity" as used in § 7 of the Natural Gas Act is found in the laws of the United States. * * *

Significantly, neither the Clayton Act nor the Natural Gas Act, 15 U.S.C. 717, *et seq.,* confers upon the Federal Power Commission specific authority to enforce the antitrust laws; yet the regulatory authority of the Commission under the Natural Gas Act was held to be sufficiently broad to obligate it to consider the antitrust laws in approving merger applications. Similarly, under Section 203 of the Federal Power Act, 16 U.S.C. 824b, the Commission considers anticompetitive consequences in approving mergers of electric utilities (*Commonwealth Edison Co.,* 36 FPC 927, affirmed *sub nom. Utility Users League* v. *Federal Power Commission,* 394 F. 2d 16 (C.A. 7), certiorari denied, 393 U.S. 953), although here too the Commission lacks the specific authority to enforce the antitrust laws.

The applicability of *Denver & Rio Grande* to the present case is thus clear: the Court there reasoned that since the Interstate Commerce Commission has broad regulatory responsibilities and traditionally considers antitrust issues in determining whether a merger or acquisition of control is in the "public interest," it cannot exclude anticompetitive issues

from consideration in applying the similar "public interest" standard to an application for approval of an issue of stock. Similarly, since the Federal Power Commission exercises broad regulatory powers in administering the Natural Gas Act and the Federal Power Act and considers anticompetitive issues in approving mergers and acquisitions under those Acts, it must also consider such issues in determining whether the refinancing of short-term debt through the issuance of bonds is in the "public interest" under Section 204 of the Federal Power Act.[10] And, as we

[10] The Commission argues (FPC Br. 17–18) that in *Denver & Rio Grande* the Court was primarily concerned with the anticompetitive potential of the acquisition of stock of one carrier by another and that since Section 5(2) of the Interstate Commerce Act applies only when one carrier acquires "control" of another, the anticompetitive potential of stock acquisitions not involving a transfer of control could be considered only under Section 20a of the Act. By contrast, the Commission points out, *all* acquisitions of one utility's stock by another must be approved by the Commission under Section 203 of the Federal Power Act. The Commission's contention is that because it considers anticompetitive consequences in Section 203 proceedings, it need not consider them in Section 204 proceedings. But *Denver & Rio Grande* cannot properly be read so narrowly. In there construing the term "public interest" in Section 20a of the Interstate Commerce Act broadly, the Court did not confine its reasoning to cases where one carrier is acquiring the stock of another but announced a rule of general application that when the ICC considers any stock issued under Section 20a it must take into account alleged anticompetitive consequences. Both *Denver & Rio Grande* (387 U.S. at 498) and the decision below (see pp. 37–39, *infra*) do, however, permit summary disposition of antitrust allegations which are frivolous or have no reasonable nexus with the transaction for which approval is sought.

discuss in detail in point II, pp. 24–37, *infra,* the structure and legislative history of the Federal Power Act reenforce the conclusion that antitrust policy is as much a component of the "public interest" in the context of a Section 204 proceeding as it is in proceedings under other Sections of the Federal Power Act.

3. As the foregoing discussion indicates, *Denver & Rio Grande* is but a specific application of the general rule that agencies must consider the nation's fundamental policy of competition to give "understandable content to the broad statutory concept of the 'public interest'." *Federal Maritime Commission* v. *Aktiebolaget Svenska Amerika Linien,* 390 U.S. 238, 244. When an agency makes economic regulatory decisions under a broad "public interest" standard, the values of free economic competition reflected in the antitrust laws are too important to be ignored. *McLean Trucking Co.* v. *United States, supra,* 321 U.S. at 80; *California* v. *Federal Power Commission, supra,* 369 U.S. at 484–485; *Federal Communications Commission* v. *RCA Communications, Inc.,* 346 U.S. 86, 94. Nor is there necessarily any irreconcilable conflict between regulatory statutes and the antitrust laws, for both share the "basic goal * * * to achieve the most efficient allocation of resources possible." *Northern Natural Gas Co.* v. *Federal Power Commission,* 399 F. 2d 953, 959 (C.A. D.C.). To carry its burden of reaching this "basic goal," a regulatory agency which must decide whether a proposed transaction is in the "public interest" should at least consider whether the transaction would interfere with competition. In this

respect, it is not only conduct by the parties which would violate the antitrust laws to which the agency must be alert (see *National Broadcasting Co.* v. *United States,* 319 U.S. 190, 222–224), but also competitive considerations which may not rise to the level of violations of the Sherman or Clayton Acts (*Federal Communications Commission* v. *RCA Communications, Inc., supra,* 346 U.S. at 93–94).

The obligation of an agency to weigh competitive factors in administering a broad regulatory statute stems from two related sources: the agency's duty of economic oversight, which functions in partial substitution for free competition; and its concomitant duty to scrutinize regulated transactions in advance for compatibility with the public interest. If an agency is to meet these responsibilities effectively, it may not authorize a transaction which involves or results in violations of other laws also representing the competitive or regulatory policy of the United States, without even considering the policies embodied in those laws. Cf. *Port of Portland* v. *United States,* 408 U.S. 811, 841. If, on the other hand, an agency is sensitive to its broad responsibilities in determining what is in the "public interest," its scrutiny of a proposed transaction may uncover in its incipiency conduct which is inconsistent with basic antitrust policy. The agency must then determine whether that conduct is sufficiently serious and sufficiently connected with the proposed transaction to warrant either disapproving the proposed transaction as not being in the "public interest" or, if within the agency's power, conditioning approval on elimination of the anticompetitive

conduct. Through such pre-transaction scrutiny, agencies regulating economic activity function as the public's first line of defense against violations of fundamental antitrust policies.

Of course, except in the limited circumstances where agencies are empowered to enforce particular antitrust laws (see, *e.g.*, Section 11 of the Clayton Act, 15 U.S.C. 21), regulatory agencies applying the "public interest" standard are not engaged in the direct enforcement of the antitrust laws. An agency's consideration of antitrust considerations as one component of the "public interest" in approving a transaction, therefore, does not normally foreclose a direct judicial challenge to the transaction under antitrust laws. See *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 350–351; *California* v. *Federal Power Commission, supra.*[11] But a regulatory agency's jurisdiction serves as a complement to the enforcement jurisdiction of the courts in implementing the nation's overall economic policy (see *Northern Natural Gas Co.* v. *Federal Power Commission, supra,* 399 F. 2d at 959), and also serves to minimize the enforcement burden upon the courts by eliminating many potential offenses before they become full-blown violations.

[11] Congress may, of course, expressly immunize certain types of approved transactions from challenge under the antitrust laws. See, *e.g.*, Section 5a(9) of the Interstate Commerce Act, 49 U.S.C. 5b(9); Section 15 of the Shipping Act, 46 U.S.C. 814. In these instances the agency's duty to consider alleged violations of other laws which have a rational nexus to the transaction in question is no less important. Cf. *Federal Maritime Commission* v. *Aktiebolaget Svenska Amerika Linien, supra; Port of Portland* v. *United States, supra.*

II. THE STRUCTURE AND LEGISLATIVE HISTORY OF THE FEDERAL POWER ACT CONFIRM THE CONCLUSION THAT THE COMMISSION MUST CONSIDER ANTICOMPETITIVE FACTORS IN DETERMINING WHETHER A PARTICULAR SECURITIES ISSUE IS COMPATIBLE WITH THE PUBLIC INTEREST

In point I we examined this Court's holding in *Denver & Rio Grande* that an agency with broad economic regulatory responsibility may not find a transaction to be in the "public interest" without considering whether the transaction is consistent with the fundamental economic policies expressed in the antitrust laws—a holding which is fully applicable to the Federal Power Commission. We shall now take a closer look at the pertinent language and legislative history of the Federal Power Act, and at the Act's legal setting.

1. Section 204(a) of the Federal Power Act prohibits electric utilities [12] from issuing securities until authorized to do so by the Federal Power Commission, and directs the Commission to authorize a securities issue only if it is "for some lawful object * * * and compatible with the public interest." Under Section

[12] Section 204(a) does not apply to utilities whose securities are regulated by State regulatory agencies (see Section 204(f)) or to holding companies subject to the Public Utility Holding Company Act of 1935, 15 U.S.C. 79, *et seq.* (see Section 213 of the Federal Power Act, 16 U.S.C. 825q). Contrary to Gulf States' contention (Br. 15–16), the fact that Congress chose to defer to State regulation of securities issues hardly proves that in the regulation which Congress did undertake it meant to limit agency consideration of securities issues to matters of financial integrity. Respect for federalism is not inconsistent with respect for competition.

204(b), the Commission may modify, or approve only part of, a proposed issuance of securities or may impose conditions in return for approval; under Section 204(c), a utility must spend the proceeds from the issuance of securities only for the purposes authorized by the Commission. The legislative history of Section 204 sheds some light on the undefined terms "lawful object" and "public interest."

The original version of the Section, as introduced in the Senate, contained no broad reference to the public interest, but instead enumerated four specific purposes for which a utility could issue securities.[13] The Senate Commerce Committee, in an effort "to attain greater flexibility and workability," cast aside the specific enumeration and substituted the present, general language of Section 204a, borrowed almost verbatim from Section 20a of the Interstate Commerce Act. S. Rep. No. 621, 74th Cong., 1st Sess., p.

[13] Section 206 of S. 1725, 74th Cong., 1st Sess., pp. 109–110 (which, when amended, became Section 204 of S. 2796—the bill which eventually was enacted), gave the Commission the authority to approve securities issuances:

"* * * if it finds that such issue * * * is for one or more of the following purposes and no others, and is reasonably necessary or appropriate for such purpose or purposes: the acquisition of property; the construction, completion, extension or improvement of the facilities or service of the public utility: the discharge or lawful refunding of its obligations; and the reimbursement of moneys actually expended from sources other than the issue of securities for any of the aforesaid purposes in cases where the applicant shall have kept its accounts and vouchers for such expenditures in such manner as to enable the Commission to ascertain the amount of moneys so expended and the purpose for which such expenditure was made."

20. Thus, the Senate specifically rejected a provision which would have limited the Commission's function in approving a securities issue to the relatively simple task of determining whether the issue is for one of certain enumerated purposes and substituted the far broader responsibility—deliberately copied from another regulatory statute—of determining whether the issue is for a "lawful object" and in the "public interest." And, in recognition of this broader responsibility, the Commission was given the power to place conditions upon approval (Section 204(c))—thus authorizing the Commission, for example, to approve an issue subject to the condition that none of the proceeds from the issue be used in connection with a particular transaction which, in the Commission's view, would not be in the "public interest."

Gulf States (Br. 12–18) and the Commission (FPC Br. 22–24) attempt to limit the scope of the terms "lawful object" and "public interest" by citing further legislative history indicating that in enacting Section 204 Congress was intent on promoting sound financial practices and preventing fiscal manipulation by utilities. While these indeed were major concerns of Congress, there is nothing in the legislative history to indicate that these were Congress' *exclusive* concerns and that other fundamental public policies, such as those expressed in the antitrust laws, should be excluded from consideration in determining what is in the "public interest." As this Court stated in

Denver & Rio Grande with respect to Section 20a of the Interstate Commerce Act (387 U.S. at 492):

> Even if Congress' primary concern was to prevent [fiscal] manipulation, the broad terms "public interest" and "lawful object" negate the existence of a mandate to the ICC to close its eyes to facts indicating that the transaction may exceed limitations imposed by other relevant laws. * * *

In the light of *Denver & Rio Grande*, there is no merit to Gulf States' (Br. 9–11) and the Commission's (FPC Br. 20–22) contention that the court below should have yielded to the Commission's earlier administrative ruling that the "plain purpose of Section 204 is to prevent the issuance of securities which might impair the company's financial integrity or its ability to perform its public utility responsibilities." *Pacific Power & Light Co.*, 27 FPC 623, 626. In that case, the Commission expressly recognized that Section 204 was modeled after Section 20a of the Interstate Commerce Act and concluded that Congress must have had similar objectives with respect to both statutes. 27 FPC at 627. Thus, when this Court in *Denver & Rio Grande* refused to give Section 20a a narrow reading, the basis of the Commission's decision in *Pacific Power & Light* was undermined and the court below correctly declined to follow it (Pet. App. 16a–17a).[14]

[14] The Commission's statement (FPC Br. 21) that it has consistently followed *Pacific Power & Light* is similarly of limited significance in view of the fact that, except for the instant case, the Commission decisions it cites were all handed down

2. In enacting the Public Utility Act of 1935, 49 Stat. 803, of which Section 204 was a part,[15] Congress had two important and related aims: to curb certain abusive practices of public utility holding companies and bring such companies under effective public control, and to provide effective federal regulation of the

---

prior to the decision in *Denver & Rio Grande*. Moreover, the Commission has not always taken so crabbed a view of the "public interest" standard contained in Section 204. In *Black Hills Power & Light Co.*, 28 FPC 1121, and *Black Hills Power & Light Co.*, 31 FPC 1605, the Commission held that proposed stock issues for a restricted stock option plan were not compatible with the public interest under Section 204(a). Over the dissents of two commissioners who claimed that the Commission was deviating from its decision in *Pacific Power & Light*, the Commission explained: "The incentives under stock option plans, however, tend naturally to divert management from their responsibilities to the public and to focus their attention on maximizing prices and earnings in order to push stock quotations ever higher. * * * The electric power industry of today recognizes that it must perform its work with a broad regard for the interests of consumers and the general public, as well as the interests of stockholders and management. Stock option plans do not lend themselves to this balanced management attitude." 31 FPC at 1611–1612. Another way for the Commission similarly to insure "a broad regard for the interests of consumers and the general public" is to require utilities to conform their conduct to the policies expressed in the antitrust laws.

[15] Title I of the Public Utility Act was the Public Utility Holding Company Act of 1935, 49 Stat. 803–838, now codified as 15 U.S.C. 79, *et seq.* Title II of the Public Utility Act technically consisted of amendments to the Federal Water Power Act of 1920 (41 Stat. 1063), but in Section 213 of the Public Utility Act (49 Stat. 847) Congress added two major new parts (Parts II and III) to the Federal Water Power Act, and changed the name of that earlier Act to the Federal Power Act. Parts II and III of the Federal Power Act are now codified at 16 U.S.C. 824, *et seq.*, and 16 U.S.C. 825, *et seq.;* Part I is codified at 16 U.S.C. 791a–823.

large and growing business of transmitting and selling electric power in interstate commerce. S. Rep. No. 621, *supra,* pp. 1–4; H. Rep. No. 1318, 74th Cong., 1st Sess., pp. 3, 7–8; *North American Co.* v. *Securities & Exchange Commission,* 327 U.S. 686; *Jersey Central Co.* v. *Federal Power Commission,* 319 U.S. 61.

Numerous practices of public utility holding companies, exhaustively surveyed by the Federal Trade Commission,[16] were found abusive. Dubious financial practices were among the most pronounced. Those abuses, Congress concluded, resulted from a structural imbalance in the economy whereby there was an intolerable "concentration of economic and political power now vested in the power trust." S. Rep. No. 621, *supra,* p. 11. Congress was aware that there had been no use of the antitrust laws, a potentially effective weapon, to halt or slow the growth of public utility holding companies. *Summary Report,* pp. 47–54.[17] Indeed, through the holding company device, economic concentration in the electric and gas industry had "assumed tremendous proportions." S. Rep. No. 621,

---

[16] See *Report of the Federal Trade Commission to the Senate of the United States on Holding and Operating Companies of Electric and Gas Utilities,* S. Doc. No. 92, Parts 1–84D, 70th Cong., 1st Sess. The Commission published its conclusions in *Utility Corporations—Summary Report,* 70th Cong., 1st Sess., S. Doc. No. 92, Part 73–A ("*Summary Report*").

[17] Senator Wheeler, in leading the debate on the legislation, commented that if the Sherman Act had "been enforced and executed and upheld as Congress intended * * * I do not think there would have been much question that holding companies could not have been organized." 79 Cong. Rec. 8392.

supra, App. 55.[18] Congress concluded that new legislation was needed to restructure the holding companies and, as restructured, to regulate their activities. Accordingly, Section 11 of Title I of the Public Utility Act (15 U.S.C. 79k) required the reduction of each holding company system into a single, integrated public utility system; while the other sections complemented this restructuring by placing a range of intercompany transactions under the control of the Securities and Exchange Commission.[19]

While Title I of the Public Utility Act thus placed the structure of holding companies under federal control, Title II—applicable to electric utilities engaged in the interstate transmission or sale at wholesale of electric power (16 U.S.C. 824(b) and (e))—was concerned not only with industry structure, but with the operational integrity of the nation's electric power system. Several years prior to the enactment of Title II, this Court had held in *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83, that the States lack the constitutional power to regulate

---

[18] Both Senator Wheeler and Representative Rayburn, the sponsors and floor managers of the legislation in the Senate and the House, labelled the situation "private socialism." Hearings Before the Senate Committee on Interstate Commerce, on S. 1725, 74th Cong., 1st Sess. ("Senate Hearings"), pp. 66–70.

[19] Sections 8, 9, and 10 (15 US.C. 79h, 79i, and 79j) placed the acquisitions of securities, utility assets and interests in other businesses under SEC control. Sections 6 and 7 (15 U.S.C. 79f and 79g) require SEC approval for securities issues. Sections 12 and 13 (15 U.S.C. 79l and 79m) either prohibit, or allow only subject to SEC rules, a variety of intercompany financial, service, sales and construction activities.

rates charged in interstate wholesale electric power transactions. In light of this decision and of the rapid growth of the electric power industry, Congress determined that federal regulation of certain aspects of the industry was needed. S. Rep. No. 621, *supra,* p. 17; H. Rep. No. 1318, *supra,* p. 7.

Title II, or Part II of the Federal Power Act, did not establish a regulatory scheme sufficiently comprehensive to preclude the operation of other federal laws, such as the antitrust laws [20] to electric utilities, but it did vest in the Commission important powers in specific areas. Specifically, Section 202(a), 16 U.S.C. 824a(a), directs the Commission to divide the nation into regional power districts and to encourage the voluntary interconnection of transmission and generation facilities within them; Section 202(b), 16 U.S.C. 824a(b), empowers the Commission under certain circumstances to order interconnections and sales and exchanges of electric energy; Sections 205 and 206, 16 U.S.C. 824d and 824e, authorize the Commission to suspend, investigate and fix wholesale rates and charges; and Section 207, 16 U.S.C. 824f, empowers the Commission to order the furnishing of adequate interstate service. Although the Commission's powers are not all encompassing—the Commission, for example, cannot compel a utility to wheel power, *i.e.,* transmit on its facilities another utility's

---

[20] The applicability of the antitrust laws to certain aspects of the electric power industry is at issue in *Otter Tail Power Co.* v. *United States,* No. 71-991, probable jurisdiction noted, 406 U.S. 944.

power (see S. Rep. No. 621, *supra,* p. 19) [21]—they are extensive; it is within the context of these significant powers over both industry structure and operations that one must view the Commission's obligation to determine whether particular transactions are in the "public interest."

3. There can be no doubt that antitrust policies are relevant to the electric power industry in general (see, generally, Meeks, *Concentration in the Electric Power Industry: The Impact of Antitrust Policy,* 72 Colum. L. Rev. 64 (1972); Shenefield, *Antitrust Policy Within the Electric Utility Industry,* 16 Antitrust Bulletin 681 (1971)), and to the administration of the Federal Power Act in particular. See *California* v. *Federal Power Commission, supra;* cf. *Northern Natural Gas Co.* v. *Federal Power Commission, supra; Pittsburgh* v. *Federal Power Commission,* 237 F. 2d 741 (C.A. D.C.). In considering the Public Utility Act, Congress was aware that "[w]hile the distribution of gas or electricity in any given community is tolerated as a 'natural monopoly' to avoid local duplication of plants * * *," such a local monopoly should be tolerated only within its proper limits. S. Rep. No. 621, *supra,* App. 55.[22] Thus, David Lilienthal, Director of

[21] Although the Commission has no authority to compel wheeling, it is our view that the district courts can compel wheeling in certain circumstances to remedy violations of the antitrust laws. See our brief on the merits in *Otter Tail Power Co.* v. *United States,* No. 71-991, probable jurisdiction noted, 406 U.S. 944.

[22] The appendix to the Senate Report, quoted above, consists of the report of the President's National Power Policy Committee.

the Tennessee Valley Authority and a member of the President's National Power Policy Committee, testified that TVA power could not compete with private power in any municipality from day to day, for two power systems cannot compete in the same locality on that basis. Hearings Before the House Committee on Interstate and Foreign Commerce on H.R. 5423, 74th Cong., 1st Sess., pp. 1962–1963 ("House Hearings"). See also the testimony of Thomas Corcoran, Senate Hearings, pp. 157–159.

But, Mr. Lilienthal explained, there is room for periodic competition: If a private utility does not perform well, the municipality may decide to buy out the company's local system. Further, the local municipal system often has a competitive choice of obtaining its wholesale power either from a private power company, or from a public agency, such as the TVA. House Hearings, pp. 1962–1963.[23] It is precisely this type of competition that the cities charged Gulf States with attempting to suppress (see pp. 5–6, *supra*). Moreover, the Federal Trade Commission called to Congress' attention the existence of a significant amount of valuable competition, both actual and potential, in the power industry. The Commission emphasized the "hundreds" of municipalities which owned their own distribution systems and could make "purchases [of power] from more than one operating system." *Summary Report, supra,* p. 52.

[23] Mr. Lilienthal stated that TVA intended to compete in this way. House Hearings, p. 1963.

In apparent recognition of the role of competition in the electric power industry, the Commission concedes in its brief that antitrust policies must be taken into account in administering many Sections of the Federal Power Act. The Commission states (FPC Br. 13–14):

> Allegations of anticompetitive conduct would be properly raised and fully considered by the Commission in proceedings to order an interconnection under Section 202, 16 U.S.C. § 824a, to approve acquisitions or any merger under Section 203, 16 U.S.C. § 824b, to review rates under Sections 205 and 206, 16 U.S.C. §§ 824d and 824e, to review charges of unduly discriminatory rates or practices under Section 205, 16 U.S.C. § 824d, or to review charges of inadequate service under Section 207, 16 U.S.C. § 824f. * * * [24]

We fully agree that the Commission must consider anticompetitive practices in connection with proceedings under Sections 202, 203, 205, 206 and 207 of the Act. In our view, however, the Commission's concession merely underscores the breadth of its responsi-

[24] In addition, the Commission notes that it may investigate allegedly anticompetitive practices by utilities under Sections 306 and 307, 16 U.S.C. 825e and 825f (FPC Br. 14–15). While this is undoubtedly true, those Sections are couched in terms of enforcing the Federal Power Act and thus do not constitute a general grant of jurisdiction to remedy anticompetitive practices or violations of the antitrust laws. Compare *Pan American World Airways* v. *United States*, 371 U.S. 296. The Commission's primary weapon for curbing anticompetitive practices is the withholding of authorization of transactions which bear some relation to such practices.

bility to administer the Act in accordance with the public interest. Nothing in the Act suggests that the term "public interest" is used in a different and narrower sense in connection with the issuance of securities under Section 204(a) than it is used with respect to an interconnection under Section 202(b) or an acquisition or a merger under Section 203(a).

The Commission's contention (FPC Br. 14) that the cities' antitrust allegations might have been raised in other proceedings misses the point. In the first place, no other proceedings were pending before the Commission and it does not appear that additional Commission-ordered interconnections under Section 202(b) between the cities and the private power companies would have provided the cities with the economies they were seeking from independent arrangements with LEC and Dow Chemical (see pp. 5–6, *supra*). More fundamental, however, is the fact that even if the cities could have aired their grievances in other proceedings, they chose to air them here; if in fact there is substance to their allegations and if in fact the proceeds from the securities issue for which approval is sought would be used to further anti-competitive conduct, then it simply may not be in the "public interest" to approve the issue. It is, therefore, the Commission's responsibility to consider these issues in the present proceeding, as the court below held.[33]

---

[33] The Commission's contention (FPC Br. 24) that *Statesville v. Atomic Energy Commission*, 441 F. 2d 962 (C.A. D.C.), conflicts with the decision below is without merit. In that case, the

4. Gulf States contends (Br. 19–20) that the court below was inconsistent in construing Section 204 to require the Federal Power Commission to consider anticompetitive factors in approving securities issues while holding that the Securities and Exchange Commission had no similar obligation in approving securities issues under Sections 6 and 7 of the Public Utility Holding Company Act. However, the duties of the two Commissions under their respective statutes—even though the statutes were enacted together as part of the Public Utility Act of 1935—are significantly different. The Public Utility Holding Company Act is concerned primarily with the structures of public utility holding companies and does not vest in the SEC any regulatory jurisdiction over utility operations. Since the anticompetitive allegations of the cities re-

---

court held that the Atomic Energy Commission is not required to consider competitive factors in issuing research and development licenses under Section 104(b) of the Atomic Energy Act (42 U.S.C. 2134(b)). As the court was careful to point out, the legislative history of that Act showed that in 1954 Congress had amended it to remove a provision which had given the Commission an affirmative obligation to consider a wide range of competitive factors in the issuance of licenses. It was clear to the court of appeals from the remarks of both the chief sponsor and the opponents of the 1954 amendment that the purpose of the new legislation was to eliminate the Commission's responsibility to consider antitrust policies in its licensing of experimental facilities. 441 F. 2d at 972–973. It was to this specific legislative history that the court of appeals referred when it spoke of "the drafters' intent to narrowly limit antitrust considerations to specific portions of the statute while expanding the health and national security considerations of the Act as a whole." 441 F. 2d at 972. In contrast, the legislative history of Section 204 of the Federal Power Act lacks any indication that Congress intended to exclude consideration of antitrust policies in the administration of that Section.

late primarily to the manner in which the private utilities were conducting their operations and not to the corporate structure of a public utility holding company, the court below correctly held that the SEC had no obligation to consider the allegations.[26] By contrast, the Federal Power Commission is concerned not only with structure; it also has quite extensive authority over the day-to-day operations of public utilities. Accordingly, in determining what is in the "public interest" under Section 204(a), the Federal Power Commission must consider antitrust allegations whether relating to industry structure or to utility operations.

III. CONSIDERATION BY THE COMMISSION OF THE ANTI-COMPETITIVE CONSEQUENCES OF SECURITIES ISSUES, IN THE MANNER REQUIRED BY THE COURT BELOW, WILL NOT IMPAIR THE UTILITIES' ABILITY TO RAISE FUNDS

Both the Commission and Gulf States argue that the need of public utilities to raise funds on an expeditious basis militates against including competitive factors as an element of the public interest under Section 204 (FPC Br. 25; Petr. Br. 24–27). This argument, however, is without merit. The decision below fully recognized that securities are often issued on a

[26] Where industry structure *is* at issue, the court of appeals has reached a different result. In *Municipal Electric Association of Massachusetts* v. *Securities and Exchange Commission*, 413 F. 2d 1052 (C.A.D.C.), the court held that under Section 10 of the Public Utility Holding Company Act, the SEC must consider the alleged competitive harm to municipal power companies of holding company acquisitions of stock in two nuclear-power electric generating companies. See also *Municipal Electric Association of Massachusetts* v. *Securities and Exchange Commission*, 419 F. 2d 757 (C.A.D.C.).

tight time schedule and provided for administrative flexibility in considering antitrust issues in connection with the approval of securities under Section 204. Specifically, the court held that the Commission "is not required to hold hearings in matters where the ultimate decision will not be enhanced or assisted by the receipt of evidence" (Pet. App. 22a); the Commission may, without hearing, reject protests raising anticompetitive claims, as long as it provides a reasoned explanation, supported by the record, "that the intervenor's contentions are too insubstantial or barren to indicate the existence of substantial anticompetitive issues, or to meet the requirement of a reasonable nexus between the activities challenged and the activities furthered by the application" (*ibid.*). The court also stated that, in view of the limited time frame in which most securities are issued, the Commission might in some cases approve the great bulk of the issue, or even the entire issue, reserving consideration of the competitive matters until a later time (Pet. App. 22a–23a). Finally, the court indicated that the Commission might defer consideration of such matters pending resolution of relevant antitrust litigation in the courts (Pet. App. 23a).

Of particular relevance here is the fact that the reports of the Interstate Commerce Commission give no indication that financing in the transportation industry has been hindered by the Commission's consideration of anticompetitive issues in authorizing securities issues under Section 20a of the Interstate Commerce Act following this Court's decision in *Denver & Rio Grande*. See 1968 Anual Report of the Interstate Commerce Commission, p. 81; 1969 Annual

Report of the Interstate Commerce Commission, pp. 79–80; 1971 Annual Report of the Interstate Commerce Commission, p. 72. There is no reason to expect that the electric power industry will encounter greater difficulties than the transportation industry. In any event, even if meaningful administrative consideration of relevant issues in proceedings under Section 204 of the Federal Power Act might result in some delays in the sale of some securities issues, that would not justify abdication by the Commission of its obligation to consider as an element of the "public interest" such fundamental national policies as those embodied in the antitrust laws.[27]

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

THOMAS E. KAUPER,
Assistant Attorney General.

SAMUEL HUNTINGTON,
Assistant to the Solicitor General.

HOWARD E. SHAPIRO,
ROBERT B. NICHOLSON,
Attorneys.

NOVEMBER 1972.

[27] The Commission's suggestion that affirmance of the decision below may lead utilities to enter holding company arrangements (FPC Br. 26–27) is highly unrealistic in view of the numerous burdens which the Public Utility Holding Company Act places on holding companies and in view of the administrative flexibility provided for in the court of appeals' opinion.

U.S. GOVERNMENT PRINTING OFFICE: 1972